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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 893

McCROSKEY & Co., Inc., *Petitioner*,

v.

N. L. WILLARD and GEORGE L. STARR,
Receivers of Kennel & Co., Inc., *Debtor*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No.

McCLOSKEY & Co., INC., *Petitioner*,

v.

N. L. WYMARD and GEORGE L. STARK,
Receivers of Kemmel & Co., Inc., Debtor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

McCLOSKEY & Co., INC., your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on March 11, 1965.

OPINIONS BELOW

The opinion of the court below (Appendix A, *infra*, pp. A-1-A18) is reported at 342 F. 2d 495. The first opinion of the district court on the merits (R. 655a-666a)* is re-

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* The printed record consists of the two volumes of Appendix for Appellant filed at the original hearing below (pp. 1a-668a), the Appendix upon Rehearing (pp. 1aa-3aa), and the Appendix upon Remand Certification (pp. 1bb-38bb). All will be referred to as "R."

ported at 217 F. Supp. 143. The opinions of the district court following remand by the court below (R. 32bb-38bb) are reported at 234 F. Supp. 706. The opinions rendered in connection with petitioner's application for a stay are reported at 190 F. Supp. 420 and 292 F. 2d 839.

JURISDICTION

The judgment of the court below (Appendix B, *infra*, p. A19) was entered on March 11, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether consent can properly be inferred in a situation where the facts demonstrate the absence of conscious choice.

2. Whether acquiescence in and admission of allegations of diversity jurisdiction which, unbeknownst both to the parties and to the district judge, were insufficient under 28 U.S.C. § 1332(c) as amended, is equivalent to consent to suit in Federal court under the provisions of § 23(b) of the Bankruptcy Act, 11 U.S.C. § 46(b).

3. Receivers in bankruptcy brought suit in a United States district court against a corporation on their corporate debtor's claim, asserting jurisdiction based on diversity of citizenship without reference to the Bankruptcy Act. The defendant unsuccessfully sought a stay, then counterclaimed, but at all times admitted the existence of diversity jurisdiction. Judgment on the merits was rendered in favor of the receivers, with findings and conclusions establishing the presence of diversity jurisdiction. On appeal, the court of appeals remanded with directions to determine the existence of diversity in the light of the 1958 amendment to 28 U.S.C. § 1332(c) that for purposes of diversity jurisdiction declared corporations be citizens both of the state where their principal place of business was located as well as of the state where they were in-

corporated. It then appeared that the debtor and the defendant both had their principal place of business in the same state, negativing diversity jurisdiction.

The question presented, on which the court below en banc divided sharply, 5 to 3, with two separate majority opinions, is whether in those circumstances the corporate defendant can be said to have consented to suit in Federal court under § 23(b) of the Bankruptcy Act, 11 U.S.C. § 46(b).

STATUTES AND RULE OF COURT INVOLVED

1. Section 2(a)(7) of the Bankruptcy Act as amended, 11 U.S.C. § 11(a)(7), provides as follows:

> "SEC. 2. CREATION OF COURTS OF BANKRUPTCY AND THEIR JURISDICTION.
>
> "a. The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this title, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to—
>
> • • • • •
>
> "(7) Cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided, and determine and liquidate all inchoate or vested interests of the bankrupt's spouse in the property of any estate whenever, under the applicable laws of the State, creditors are empowered to compel such spouse to accept a money satisfaction for such interest; and where in a controversy arising in a proceeding under this title an adverse party does not interpose objection to the summary jurisdiction of the court of bankruptcy, by answer or motion filed before the expiration of the time prescribed by law